

Message Text

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C O N F I D E N T I A L SECTION 1 OF 2 USNATO 0538

E.O. 11652: GDS

TAGS: MARR NATO

SUBJ: INVITATION FOR BID (IFB) FOR NICS/TARES PROCUREMENT

REFS: A. USNATO 0124, 14 JAN 75; B. USNATO 0192, 16 JAN 75.

SUMMARY. FINAL TEXT OF NICSMA STATEMENT ON NICSMA INTERPRETATION OF LIQUIDATED DAMAGES CLAUSE AND INVITATION FOR BID (IFB) (AC/4(P)DS/1014, ANNEX) AS WELL AS NICSMA REPLY TO UK QUESTIONS ON SUBJECT PROCUREMENT (NICSMA/HB(75)18, 27 JAN 75) FOLLOW. ACTION REQUESTED: THAT DEPARTMENT OF COMMERCE PROVIDE TEXTS OF THESE NICSMA STATEMENTS TO US BIDDERS. END SUMMARY.

1. IN PARA 1B OF REF B MISSION SUMMARIZED DISCUSSION AT P&P COMMITTEE MEETING ON LIQUIDATED DAMAGES CLAUSE IN SUBJECT IFB. AC/4(P)DS/1014, ANNEX, CONTAINS THE FINAL TEXT OF THE NICSMA INTERPRETATION ON THIS POINT. TEXT OF THIS ANNEX FOLLOWS:

BEGIN TEXT:

SUBJECT: TARE IFB

PREREQUISITES FOR THE EXCUSABILITY AGAINST LIQUIDATED DAMAGES UNDER ART. 39 OF THE SPECIAL CLAUSES

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REF: ITEM I.2(D)

ART. 39 OF THE SPECIAL CLAUSES STATES THAT THE CONTRACTOR SHALL NOT BE CHARGED WITH LIQUIDATED DAMAGES WHEN THE DELAY ARISES OUT

OF COURSES BEYOND HIS CONTROL AND WITHOUT HIS FAULT OR NEGLIGENCE
AS DEFINED IN PARA (C) OF CLAUSE 15 - DEFAULT - OF THE GENERAL
PROVISIONS.

IN THIS CLAUSE SEVERAL CAUSES FOR EXCUSABILITY ARE GIVEN AS
EXAMPLES, SUCH AS

- . ACTS OF GOD, OR OF THE PUBLIC ENEMY;
- . ACTS OF NCSO;
- . FIRES, FLOODS;
- . STRIKES, FREIGHT EMBARGOES.

HOWEVER, "IN EVERY CASE THE FAILURE TO PERFORM MUST BE BEYOND THE
CONTROL AND WITHOUT THE FAULT OR NEGLIGENCE OF THE CONTRACTOR".

THUS, UNDER THESE ABOVE CONSTRAINTS OF THE CONTRACT AND IN THE
LIGHT OF THE INDIVIDUAL CIRCUMSTANCES FOR EACH CASE, THE FOLLOWING
EVENTS WOULD NORMALLY FURNISH AN EXCUSE FOR A FAILURE TO PERFORM
IN TIME AND WOULD BAR AN IMPOSITION OF LIQUIDATED DAMAGES FOR
THAT SPECIFIC AMOUNT OF TIME:

- . STRIKES, WITH OR WITHOUT UNION SANCTION; INCLUDING
CONCERTED PICKETING, RESULTING IN A LOSS OF LABOUR
HOURS AND ABSENTEEISM AND SLOWDOWNS;

- . INABILITY TO SECURE RAW MATERIAL OR TO SECURE THE
MEANS OF PRODUCTION AND DELIVERY IF IT WAS REASONABLY
NOT POSSIBLE, TO LOCATE ANY OTHER SOURCES FOR THE
MATERIAL OTHER THAN THOSE THE CONTRACTOR HAD TRIED;

- . FAILURE OF A SUBCONTRACTOR OR SUPPLIER IF THE DELAYS
WERE UNFORESEEABLE AND BEYOND THE CONTRACTOR'S CONTROL
AND WITHOUT HIS FAULT OR NEGLIGENCE.

END TEXT.

2. IN ADDITION TO US QUESTIONS DISCUSSED REFS A AND B, UK
DELEGATION ALSO ADDRESSED SEVERAL QUESTIONS TO NCSMA ON THE SUBJECT
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IFB. MOST OF THESE QUESTIONS WERE OF A SIMILAR NATURE TO THE US
QUESTIONS (I.E., DEGREE OF RISK AND LIABILITY, APPARENT NCSMA
INFLEXIBILITY IN INTERPRETATION, ETC.) AND, EXCEPT FOR TWO POINTS,
THE P&P DISCUSSION ANSWERED THE UK CONCERNS ALSO. NCSMA/HB
(75)18 CONTAINS NCSMA'S REPLY TO THE REMAINING TWO POINTS,
AS FOLLOWS:

BEGIN TEXT.

SUBJECT: NCSMA COMMENTS ON MATTERS RAISED BY UK DELEGATION
RESULTING FROM TARE BIDDERS' CONFERENCE

REF: A. UK DELEGATION LETTER 15/NCS/6 DATED 10TH JANUARY,
1975.

B. NICSMA/HB(75)1 DATED 9TH JANUARY, 1975.

1. AS A RESULT OF DISCUSSIONS AT THE P&P COMMITTEE MEETING OF 16TH JANUARY, 1975, THE UK DELEGATION HAVE CONFIRMED THAT WITH THE EXCEPTION OF ITEMS UNDER SUB-PARAGRAPH 1(C) AND 1(D) OF REFERENCE A, QUESTIONS RAISED BY THEM IN REFERENCE A WERE SATISFACTORILY ANSWERED IN REFERENCE B.

2. NICSMA'S COMMENTS ON THE OUTSTANDING QUESTIONS ARE ATTACHED AT ANNEX A AND ANNEX B HERETO. IT SHOULD BE NOTED THAT BOTH OF THESE ITEMS HAVE BEEN REFERRED TO IN WRITTEN RESPONSES TO BIDDERS QUESTIONS AND THAT ITEM 1(D) HAS BEEN FURTHER ADDRESSED IN AMENDMENT III TO THE IFB AS SHOWN IN ANNEX A.

ANNEX A

UK DELEGATION QUESTION 1(D)
(SUB-CONTRACTS)

AMENDMENT NO. III TO THE IFB, REPEATED BELOW FOR CONVENIENCE, PROVIDES A RELAXATION OF REQUIREMENTS AS INDICATED IN THE ANSWER TO QUESTION 224.

"6.5 IN THE EVENT THAT A SUB-CONTRACTOR REFUSES DESPITE CONTRACTOR'S BEST EFFORTS TO ACCEPT SOME OR ALL OF THE OBLIGATIONS SET FORTH IN THIS CONTRACT AND PROVIDED THAT NO ALTERNATE SUB-CONTRACTOR WILLING TO ACCEPT SUCH CONFIDENTIAL

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OBLIGATIONS IS AVAILABLE, THE CONTRACTOR SHALL BOTH IMMEDIATELY NOTIFY THE PURCHASER IN WRITING AND BY REGISTERED LETTER ON THIS SITUATION, AND RECOMMEND SOLUTIONS HOW TO OVERCOME THIS SITUATION. IN NO WAY SHALL A SUB-CONTRACTOR'S REFUSAL REDUCE ANY OF THE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT".

ANNEX B

UK DELEGATION QUESTION 1(C)
(TRANSFER OF TITLE)

1. RISK OF CONTRACTOR

(A) THE REQUIREMENT SPECIFIED IN THE TARE BIDDING DOCUMENT IS FOR THE PROCUREMENT OF A TARE NETWORK CONSISTING OF A NUMBER OF TARE SYSTEMS. TRANSFER OF TITLE IS THUS ALIGNED TO TAKE THIS INTO ACCOUNT.

(B) IN THE ANSWER TO QUESTION 189, NICSMA ADDRESSES THE POINT MADE BY THE UK AUTHORITIES AS FOLLOWS:-

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"AS STATED IN ARTICLE 17.2, THE PURCHASER ASSUMES THE RESPONSIBILITY FOR CUSTODY, MAINTENANCE AND OPERATION OF THE EQUIPMENT AND ABSOLVES THE CONTRACTOR FROM RISK RESULTING FROM GROSS NEGLIGENCE OF OFFICERS, AGENTS OR EMPLOYEES OF THE PURCHASER ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT. FURTHER TO THIS, THE PURCHASER HAS, ON COMPLETION OF PROVISIONAL SITE ACCEPTANCE, PAID TO THE CONTRACTOR A MAJOR PROPORTION OF THE COST OF THAT EQUIPMENT IN ACCORDANCE WITH ARTICLE 14. THEREFORE, USE OF THE EQUIPMENT AS DEFINED AFTER PROVISIONAL SITE ACCEPTANCE IS NOT CONSIDERED TO BE UNREASONABLE".

THE DEGREE TO WHICH A CONTRACTOR "REMAINS AT RISK" IS, THEREFORE, STRICTLY LIMITED AND THE RISK IS NO GREATER THAN IS TO BE EXPECTED WHERE THE CONTRACTOR HAS AN OVERALL RESPONSIBILITY CONCERNED WITH PROVISION OF A NETWORK - THE COMPONENT PARTS OF WHICH MUST BE SEEN TO INTER-OPERATE CORRECTLY. THE DEGREE OF RESIDUAL RISK DIMINISHES AS THE TIMESCALE MOVES TOWARDS FINAL NETWORK ACCEPTANCE AND THIS IS, IN ITSELF, AN ENCOURAGEMENT TO REACH THIS EVENT ON SCHEDULE (AND THUS NOT PROLONG THE RISK), WHILST AT THE SAME TIME ENSURING THAT THE CONTRACTOR MAINTAINS A CLOSE INTEREST IN THE FACTORS AFFECTING OPERATION OF THE INDIVIDUAL TARS IN-SO-FAR AS THEY MUST INTER-OPERATE WITHIN THE NETWORK WHICH, COLLECTIVELY, THEY COMPRISE.

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(C) THE RISK TO NATO DURING THIS PERIOD OF TIME IS THAT IT HAS PAID THE MAJORITY OF THE QUOTED PRICE FOR COMPONENT PARTS OF THE NETWORK AND HAS COMMITTED THE INDIVIDUAL TARE TO

OPERATIONAL USE PRIOR TO THE FINAL PROOF THAT THEY WILL, INDEED, OPERATE AS A NETWORK.

(D) THE FACTORS AFFECTING THE DEGREE OF RISK REMAINING WITH THE CONTRACTOR WERE CAREFULLY CONSIDERED PRIOR TO DRAWING UP ARTICLE 17 AND NICSMA REMAINS CONVINCED THAT THE REQUIREMENT STATED PROVIDES ONLY THE MINIMUM PROTECTION FOR NATO AND IS A REASONABLE SHARING OF RISK BETWEEN NATO AND A CONTRACTOR.

THE ANSWER TO QUESTIONS 126, 221 AND 234 ARE ALSO RELEVANT.

2. PAYMENT

(A) NICMSA HAS AMENDED THE MILESTONE PAYMENT SCHEDULE AS SHOWN IN AMENDMENT III TO THE IFB. THE EFFECT OF THIS AMENDMENT WILL BE TO RELEASE A FURTHER SUM OF MONEY TO THE CONTRACTOR ON SUCCESSFUL COMPLETION OF THE FACTORY SYSTEM TEST AND PRIOR TO PROVISIONAL SITE ACCEPTANCE OF EACH TARE.

(B) NICSMA CANNOT UNDERSTAND THE ANXIETY EXPRESSED THAT THERE COULD BE A "POSSIBLE LACK OF PAYMENT DURING PROTRACTED ACCEPTANCE" SINCE PAYMENT WILL BE MADE PROMPTLY ON SUCCESSFUL COMPLETION OF THOSE TESTS WHICH DEMONSTRATE THAT A CONTRACTOR HAS COMPLIED WITH THE REQUIREMENTS OF THE CONTRACT. IT IS FUNDAMENTAL THAT A CONTRACTOR WHO FAILS TO MEET A MILESTONE (E.G. SUCCESSFUL COMPLETION OF A TEST) IS NOT ENTITLED TO THE RELATED MILESTONE PAYMENT.

3. WARRANTY

(A) THE EXPLANATION OF NICSMA'S POSITION ON WARRANTY HAS BEEN GIVEN UNDER PARAGRAPH 1 ABOVE AND UNDER THE ANSWER TO QUESTION 126.

(B) NICSMA HAS ALREADY STATED THAT CONSUMABLE ITEMS SUCH AS LIGHT BULBS, ETC., WOULD NOT BE A SUBJECT FOR CLAIM UNDER WARRANTY. THE TYPE OF EQUIPMENT ENVISAGED MAY, HOWEVER, CONTAIN HIGH COST COMPONENTS WHICH ARE NON-REPAIRABLE (E.G. PRINTED CIRCUIT BOARDS, CONFIDENTIAL

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DISCS AND DISC HEADS) WHICH, DUE TO A HIGH STATED MTBF ARE GUARANTEED FOR USE OVER A PERIOD OF TIME WHICH MAKES THEIR EVENTUAL DISPOSAL A MORE ATTRACTIVE PROPOSITION THAN REPAIR. IN CASE OF EARLY FAILURE OF SUCH ITEMS - WHICH COULD BE TERMED "CONSUMABLE- - NICSMA WOULD WISH TO EXERCISE ITS RIGHTS UNDER WARRANTY. FOR THIS REASON A GENERAL CONCESSION CANNOT BE GIVEN TO ALL "CONSUMABLE ITEMS" UNDER THE WARRANTY CLAUSE.

3. RECOMMEND DEPARTMENT OF COMMERCE PROVIDE TEXTS OF THESE NICSMA STATEMENTS TO US BIDDERS.BRUCE

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